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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MEGANET CORPORATION, Plaintiff and Appellant, v. RALPH LOTKIN et al., Defendants and Respondents.	B203778 (Los Angeles County Super. Ct. No. BC 370236)

APPEAL from an order of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed and remanded.

David Jung for Plaintiff and Appellant.

Katten Muchin Rosenman and Charles M. Stern for Defendants and Respondents.

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Meganet Corporation (Meganet) appeals from the trial court's grant of a Code of Civil Procedure section 425.16 (section 425.16) special motion to strike the complaint that Meganet filed against respondents Ralph Lotkin and Laura Callahan.[1] Meganet contends the trial court erred in striking its complaint because (1) respondents' defamatory statements about Meganet and its products did not arise from an act in furtherance of respondents' right of petition or free speech, and (2) the trial court improperly refused to consider whether Meganet demonstrated a probability of prevailing on its claim. Meganet further contends that because the section 425.16 motion should not have been granted, the trial court improperly awarded respondents their attorney fees and costs. We affirm.

FACTS AND PROCEDURAL HISTORY[2]

1. Complaint

Meganet commenced this action against respondents claiming defamation by slander, trade libel, intentional interference with contractual relationship and prospective economic advantage, and conversion. In addition to damages, Meganet sought a temporary restraining order, preliminary injunction and permanent injunction against respondents. The complaint alleged as follows.

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[1] Both respondents are out-of-state residents. At the same time it granted respondents' special motion to strike, the trial court also granted their motion to quash service of process for lack of personal jurisdiction. Initially, the court had tentatively ruled the special motion to strike would be moot upon the granting of the motion to quash. The court, however, proceeded to hear and decide the section 425.16 motion after allowing supplemental briefing and after concluding the court retained jurisdiction to award attorney fees and costs under section 425.16, subdivision (c).

[2] We note that Meganet's statement of facts in its opening brief contains not a single reference to the record, and the brief simply parrots the unsubstantiated allegations of the complaint. This is a gross violation of applicable appellate rules. (See Cal. Rules of Court, rule 8.204(a)(1)(C) & (2)(C) [each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears," and an opening brief must "[p]rovide a summary of the significant facts limited to matters in the record"].) We nevertheless have independently reviewed the entire record.

Respondent Lotkin is an attorney licensed in Washington, D.C. Lotkin acted as an independent contractor for Meganet for seven years assisting the company with making sales to the federal government. Respondent Callahan is a retired federal employee. Callahan worked for Meganet for about two years as an independent contractor assisting Lotkin.

Meganet claimed that in approximately late January 2007, Lotkin, with Callahan's assistance, attempted to "defraud" Meganet out of a $150,000 sale to the federal government. Meganet purportedly was able to "thwart" respondents' plan in exchange for their resignations "just prior to them both being fired by Meganet."

In approximately February 2007, Meganet executed a contract with the United States Department of Veterans Affairs (VA) to exclusively provide the VA with biometric drives (bio drives). Meganet allegedly had "the only certified solution" in the market. Meganet expected to make $30 million in sales to the VA and was close to completing the contract.

In late April 2007, Meganet learned that Callahan had contacted the VA and had told the VA that Meganet's certificates for its bio drive products were "not valid" for the products they were offering. This statement allegedly was untrue and Callahan knew it was untrue. Meganet alleged it had valid certificates for its products.

According to the complaint, "on multiple dates and [at] multiples times and places, to be more specifically identified during discovery," respondents made "false and defamatory statements" about Meganet's products to its board members, investors and customers. *Meganet did not allege what statements respondents purportedly made to these persons or disclose any details regarding the alleged defamation*. Meganet claimed only that respondents disparaged the quality of Meganet's workmanship, the quality of Meganet's products and Meganet's efforts and ability to do business with the federal government.

2. Special Motion to Strike

Respondents filed a section 425.16 special motion to strike the entire complaint, on the grounds that each cause of action arose out of statements protected under section 425.16, subdivision (c).

In their motion, respondents asserted they each had a substantial background and experience in government security issues. During the course of their services to Meganet, they raised with Saul Backal, the chief executive officer of Meganet, crucial questions about whether the products Meganet was selling to the federal government were in compliance with strict government criteria for encryption devices. Respondents discovered evidence that Meganet's representations to the government, including representations concerning the countries of origin of Meganet's products offered for sale to the government, were not true. Respondents stated they were concerned about being involved with a company making false representations to the government. Lotkin in particular was concerned because of his position as a licensed attorney and as a former Staff Director and Chief Counsel for the Committee on Standards of Official Conduct of the United States House of Representatives. He also did not wish to jeopardize his Top Secret clearance issued by the National Security Agency (NSA).

Respondents stated their relationship with Backal deteriorated due to their persistent questioning of Backal and Backal's perceived lack of candor in responding to their concerns; they concluded they could no longer be associated with Meganet due to its misrepresentations to the government, and they therefore terminated all relations with Meganet in February 2007. Meganet soon thereafter filed the present action against each of them. Lotkin and Callahan provided the court with declarations and documentary evidence supporting their special motion to strike as follows.

A. Lotkin Declaration

Lotkin described his background of long years of government service in key positions, including his service in the Office of General Counsel of the United States General Accounting Office (GAO), as a consultant for the Comptroller General of the United States, and as Chief Counsel and Staff Director for the House Committee, during

which he was responsible for numerous investigations of members of the Congress. As an attorney in his various capacities, Lotkin received security clearances, including Secret, Top Secret, National Security "Q" for nuclear defense activities and clearances supervised by the Central Intelligence Agency. Lotkin went into private practice in 1990 and since then has provided legal representation to congressional, individual and corporate clients in civil, criminal, policy and legislative matters.

In 2000, Lotkin agreed with Backal to assist Meganet in obtaining export approval from the government for Meganet's encryption technology. This relationship progressed to the extent that Lotkin agreed to represent Meganet more generally from his office in Washington, D.C. and to allow his law firm office to be used as the Washington, D.C. office for Meganet. Lotkin also agreed to serve as chief operating officer and a member of the board of advisors for Meganet in exchange for Meganet stock.

In or about late 2004, Lotkin began working with Callahan, a longtime friend with vast experience in information technology, and Callahan later assisted him as a consultant for Meganet.

Over time, Lotkin became increasingly concerned about Backal's representations about the countries of origin for Meganet's products and their proper certifications. His concern was two-fold: (1) If Meganet misstated the country of origin it would violate stringent government country of origin requirements for encryption products; and (2) a misstatement of country of origin would mislead the buyer and potentially lead to a serious breach of barriers to access restricted government information.

In the summer and fall of 2006, Lotkin saw affidavits of origin on Meganet's radio frequency jammers that showed Israel as the point of manufacture. Backal had asked Lotkin to remove the shipping labels from those products before delivering them to the buyer. When questioned, Backal assured Lotkin that Meganet had a manufacturing facility in the United States, and he became agitated or hostile when Lotkin pursued the subject. Lotkin attempted to impress upon Backal the importance of technical accuracy in bids and the need to have a factual basis for all claims. Backal interpreted these efforts as doubt about his integrity and asserted Lotkin had insufficient knowledge of Meganet's

products. Backal became negative and hostile when Lotkin raised questions about whether Meganet had a security-cleared facility or staff, qualifying past performance or financial records to substantiate the claim that Meganet was an ongoing concern capable of fulfilling an order.

In late 2006 or early 2007, Backal complained to respondents that they had missed or failed to submit bids on several solicitations and had failed to provide documentation of their sales efforts on behalf of Meganet. Lotkin responded, explaining Meganet did not qualify for those bids and it would have been a material misrepresentation for Meganet to claim otherwise. Backal did not reply and became difficult to reach.

In January 2007, Backal accused respondents in an e-mail (entitled "State of the Union Address") of various shortcomings including incompetence and lack of knowledge of the company. Lotkin again sent a detailed reply.

Lotkin and Callahan decided to terminate their association with Meganet, and each submitted a resignation on February 23, 2007. Respondents requested that Meganet give them a complete accounting, pay commissions and issue the stock certificates to which they were entitled. Backal responded to the resignations by accusing Lotkin of stealing $150,000 from Meganet.

Lotkin denied Backal's allegations in an e-mail, and Backal apologized for "getting emotional." He offered to retract his allegations in exchange for a mutual release from respondents. Lotkin stated he was reluctant to sign a release that impliedly admitted misconduct, and he repeated the request for payment for past efforts, enclosing extensive documentation of the work respondents had performed for Meganet. Backal disputed respondents' claims for commissions and offered to buy their Meganet stock at a fraction of their value. Backal threatened respondents with litigation if they took any action against Meganet. He further threatened to have Lotkin criminally prosecuted and disbarred, and to cause Callahan to lose her security clearance.

On April 20, 2007, a few days before Meganet filed its complaint against respondents, Backal sent Lotkin an e-mail with a copy to Callahan stating, among other things: "We've just got an e-mail from VA stating that Laura Callahan called them and

claimed our F[ederal] I[nformation] P[rocessing] S[tandard] 140-2 certificate was valid for the old products and not for the current products, which is a complete lie. Laura is trying to shoot down our contract."[3]

Lotkin attached copies of his correspondence with Backal as exhibits to his declaration. He also attached a copy of a Meganet "Investor Update and Annual Meeting Invitation" dated May 1, 2007. In that document, Backal informed investors, "Meganet's VME Bio Drives were chosen by the [VA] as their biometric solution of choice. We have fielded very large orders in the last few months and the customer is highly satisfied with the quality of our products. We forecast major sales to this account in the coming years." In a further Investor and IPO Update dated July 7, 2007, which Lotkin also attached as an exhibit, Backal informed Meganet investors that "we are in process of romping [*sic*] up our BioDrives production and sales to the federal government."[4]

Lotkin declared Meganet's claim that he converted $150,000 or any sum payable to Meganet for a federal sale was utterly false. He denied receiving that amount from a Meganet customer and also denied depositing such sum in any bank account he maintained or controlled. Lotkin stated the only sums he received associated with activities on Meganet's behalf came from Meganet itself. Those sums were sent to him by Meganet with Backal's approval and signature. Lotkin stated that after he learned

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[3] Backal's e-mail further stated, "You are a CRIMINAL and this is a crime. I'll put you both [in] jail for this SO HELP ME GOD!!!! [¶] I'm launching a lawsuit and a federal investigation. You will end in jail, GUARANTEE!!!! [¶] [A]s for Ralph, I'm calling the Bar association, launching a wire fraud investigation with the FBI and going to the DA. [¶] As for Laura, I'm taking the stolen papers from DOL and going to the IG & The FBI. I will also file with the DA. [¶] I SWEAR TO GOD TO PUT YOU TWO DAMN CRIMINALS IN JAIL FOR THE REST OF YOUR LIVES. IF YOU WANTED TO TEST ME HERE IT COMES. [¶] Better stack on pictures of your family to look at when you're in jail. [¶] May god be with both of you!!!"

[4] These admissions by Backal directly contradicted the allegations in Meganet's complaint that respondents interfered with Meganet's sales of its bio drives to the VA.

Backal was accusing him of being a thief, he sent Backal an e-mail denying that he stole money from Meganet. Backal never replied to this e-mail.

B. Callahan Declaration

Callahan declared she had worked in information technology for 24 years. She held positions of increasing complexity, acting as programmer, systems analyst, cyber security officer, chief architect, supervisory computer specialist, branch chief, director of information technology and deputy chief information officer. She worked for the federal government for approximately 20 years, nine years for the Department of Defense and 11 years for civilian agencies.

During her last five years of civil service, Callahan served on the federal-wide Chief Information Officers (CIO) Council and CIO Council's executive steering committee. In that position, she was directly involved with the Executive Office of the President, Office of Management and Budget (OMB) in drafting privacy and security guidelines for safeguarding sensitive government information. Callahan stated she holds a Top Secret clearance issued by the NSA.

Through her positions, Callahan was familiar with the government's security procedures and devices for safeguarding against unauthorized loss or theft of data. Callahan knew the government had stringent requirements for vendors who sell encryption devices and other military products to the government.

In October 2006, Callahan began serving as a consultant for Meganet, assisting Meganet in government sales and technical support. While preparing formal quotations and responses to government solicitations, Callahan became concerned that the information Meganet was providing the government might be fraudulent. For example, Meganet sold a "spy phone," a cellular telephone modified for covert operations, and radio frequency jammers. Meganet posted those products on the Government Services Administration Schedules with the country of origin listed as the "United States of America." Callahan learned from Backal that the spy phones were made by a Maganet employee who lived in Israel. She also learned that the radio frequency jammers were engineered and manufactured in Israel by another company and resold under Meganet's

name. She further learned the software programmer for Meganet's encryption software lived in Israel.

From her background with the government, Callahan knew country of origin declarations were material, because products made or services provided outside the United States might not be eligible for consideration or might require additional documentation to identify risks from foreign ownership, control or influence. A misstatement about the country of origin would be a violation of stringent government requirements for communications and encryption products. The buyer, usually the federal government, would be misled into believing the product was of domestic, rather than foreign, origin, which could lead to a serious breach of barriers to access to restricted government information, including a foreign entity's ability to embed a secret backdoor for espionage.

Callahan questioned Backal about Meganet's capabilities, foreign affiliates, alliances, partnerships and products. She also sought further information needed to market Meganet's products. Backal met her inquiries with silence or hostility. Callahan attempted to obtain that information from other employees of Meganet, but she was only referred back to Backal. When Callahan persisted with questions, Backal threatened her, suggesting that if Callahan did not keep quiet and stop talking to government officials, he would file lawsuits and have federal investigations launched against her to have her security clearance revoked.

Because of Backal's threats, Callahan terminated her association with Meganet on February 23, 2007.

Callahan specifically denied the allegations in Meganet's complaint. She denied she contacted the VA in late April 2007 claiming that "Meganet's certificates for their bio drive products were not valid for the products they were offering." She categorically denied informing the VA that Meganet's certificates were invalid or ever mentioning Meganet in her communications with the VA.

Callahan indicated what actually occurred was the following. In late spring and early summer of 2006, there were several media reports about the loss or theft of

government computers containing thousands of records of citizens' and veterans' personal information. In response, the OMB issued memoranda to the federal agencies reminding government officials of their statutory and regulatory responsibilities to safeguard sensitive and personally identifiable information. A June 2006 OMB memorandum specifically directed the departments and agencies to encrypt all data on mobile computer devices, e.g., thumb drives, that carry agency data, unless the data is nonsensitive.

For approximately the last 10 years of her career with the government, Callahan had been responsible for ensuring compliance with directives for safeguarding sensitive and personally identifiable information. In April 2007, John Gardner, Acting Director of the Enterprise Security Solutions Service unit at the VA, informed Callahan that the VA was conducting an internal audit of its approved encryption products. The audit had disclosed the VA was purchasing a thumb drive encryption product that did not comply with the established federal information processing standard.[5] Gardner sought Callahan's assistance. He asked Callahan to explain how a vendor could claim its product complied with government standards when it did not. Callahan replied by an e-mail, dated April 18, 2007, in which she laid out two scenarios under which a vendor could claim to have received security validation for their thumb drive product without its being compliant and how to tell if the vendor's claim was legitimate. Gardner advised Callahan he had shared her e-mail with the National Institute of Standards and Technology at the Department of Commerce, which confirmed her interpretations were correct.

Callahan declared that Gardner was the only person at the VA with whom she communicated on this subject.

Callahan also denied that she made false statements, spread false or unfounded rumors or made untrue statements about Meganet, its products or its certificates to board members, investors or customers. She attached to her declaration documents she

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[5] Callahan declared the vendor was not Meganet, nor was the encryption product one sold by Meganet.

obtained from the publicly accessible Federal Procurement Data System website. The documents showed that Meganet received a purchase order from the VA on April 11, 2007, with an estimated completion date of July 1, 2007, a date after Meganet filed its complaint. The website also showed the VA gave Meganet a purchase order for bio drives in May 2007, almost three weeks after the complaint, indicating the VA was continuing to do business with Meganet.

Callahan also attached a document entitled "FIPS 140 Validated Thumb Drive Report," which the VA published on April 19, 2007. The VA reported it had three vendors of thumb drives who met the National Institute of Standards and Technology requirements. One of the listed vendors was Meganet. The VA report refuted the claim that Callahan prevented Meganet from completing its deal with the VA. The report also proved untrue Meganet's allegations that it was the only source for bio drives for the VA or that it was the "exclusive" supplier to the VA.

In her declaration, Callahan further denied that she assisted Lotkin to defraud Meganet of $150,000 or diverted funds intended for Meganet. She conducted a search of the federal procurement data system for the period October 1, 2006, to May 1, 2007, and found there were no government purchases from Meganet of $150,000 or greater during that period.

C. Attorney Fees and Costs

Counsel for respondents submitted a declaration and two supplemental declarations requesting and substantiating claimed attorney fees and costs of $44,254 for the section 425.16 motion. Counsel provided the court with the hourly charge for each attorney who worked on the matter, the number of hours expended on the special motion to strike and the fees that were incurred by respondents.

3. Opposition to Special Motion to Strike

Meganet filed a memorandum of points and authorities in opposition to the special motion to strike. It made no attempt to establish a probability it would prevail on its claim. The opposition memorandum merely repeated Meganet's allegations without offering any evidence to support them. Instead, Meganet relied on the argument that

respondents' conduct was not an act in furtherance of their right of petition or free speech but fell within the "commercial speech" exception of Code of Civil Procedure section 425.17. The only declaration Meganet offered with its opposition was a declaration by counsel requesting attorney fees and costs in opposing the section 425.16 motion.[6]

4. Order Granting Special Motion to Strike and Award of Attorney Fees and Costs

The trial court granted the special motion to strike as to the entire complaint and awarded respondents attorney fees and costs as requested in the amount of $44,254. This timely appeal ensued.

STANDARD OF REVIEW

The standard of review to be applied when reviewing an order granting or denying a section 425.16 special motion to strike is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269.)

DISCUSSION

Section 425.16 provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The statute further provides that "[a]s used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or

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6 Although the record indicates Meganet belatedly attempted to submit a declaration by Backal, respondents objected on grounds including untimeliness and lack of foundation. The court apparently sustained the objection. Meganet has not made the proffered Backal declaration a part of the record on appeal and has not raised the exclusion of such evidence as error.

judicial body, or any other official proceeding authorized by law; . . . (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Id.*, subd. (e).)

There is a two-step process for determining whether an action is subject to a section 425.16 special motion to strike: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); [citation].)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, citing *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

To determine whether a defendant has met his or her initial burden, we consider the pleadings and any supporting and opposing affidavits stating facts upon which the liability is based. (§ 425.16, subd. (b)(2); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) "[T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*Id.* at p. 78.) The "principal thrust or gravamen" of the claim determines whether section 425.16 applies. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

1. Act in Furtherance of Right of Petition or Free Speech

As noted, speech protected by section 425.16 includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law (§ 425.16, subd. (e)(1)) and any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body (*id.*, subd. (e)(2)). Other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a

public issue or an issue of public interest is also protected by the statute. (*Id.*, subd. (e)(4).) We conclude the conduct at issue here is protected under all three provisions.

Lotkin's declaration in support of the special motion to strike explained the significance of Meganet's misrepresentations about the encryption products it was attempting to sell the government. Callahan's declaration demonstrated the connection between respondents' conduct and the official proceeding undertaken by the VA to enhance protection of its sensitive information.

As the record reflects, Callahan's communications were with a government official, the Acting Director of the Enterprise Security Solutions Service unit at the VA. Her declaration showed those communications related to an ongoing audit and investigative proceeding initiated by the VA under the Inspector General Act of 1978 (5 U.S.C. § 1 et seq.) concerning privacy and security guidelines for safeguarding sensitive and personally identifiable information. The official informed Callahan that the VA was conducting an internal audit of its approved encryption products and the audit had disclosed the VA was purchasing a thumb drive encryption product that did not comply with established federal information processing guidelines. The official inquired of Callahan how a vendor could claim to be compliant with government standards yet have a noncompliant product. Callahan declared any statement she made to the VA was made in the context of replying to the VA official's inquiry.

Indeed, the e-mail communications, which were attached, show the subject of the communications as "NIST [National Institute of Standards and Technology] Contact Info and FIPS 140-2 Implementation Guidance," a clear reference to the VA's internal audit and processing of guidelines. The evidence thus established that Callahan's statements to the VA were made in an "executive proceeding" under section 425.16, subdivision (e)(1)[7] and concerned "an issue under consideration or review" by an executive body

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[7] Meganent argues that the trial court did not grant the special motion to strike under subdivision (e)(1) of section 425.16 but rather under subdivision (e)(2) and (4). But, we examine the trial court's ruling, not its reasons for ruling. (*D'Amico v. Board of Medical*

protected under section 425.16, subdivision (e)(2). The constitutional right to petition includes the basic act of seeking administrative action. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 474; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.)

The declarations of Lotkin and Callahan further showed that, although the vendor Callahan was referring to in her communications with the government official was not Meganet and the encryption product was not a product sold by Meganet, two days after Callahan's e-mail to the official, Backal sent an e-mail to respondents, stating, "We've just got an email from VA stating that Laura Callahan called them and claimed our FIPS 140-2 certificate was valid for the old products and not for the current products, which is a complete lie." Backal accused respondents of subverting Meganet's status with the VA in the e-mail and declared, "I'm launching a lawsuit and a federal investigation. You will end in jail . . . ." The evidence shows Backal threatened Callahan numerous times, suggesting that if she did not keep quiet and stop talking to government officials, he would file lawsuits and instigate federal investigations to have her security clearance revoked. He made similar threats to Lotkin. It is clear Backal's threats to respondents arose from Callahan's communications with the VA official in connection with the administrative proceeding regarding a matter under review by an executive body.

It also appears that the statements complained of constituted "other conduct" in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e)(4).) Both Callahan's and Lotkin's communications with Backal are replete with their concerns about Meganet's compliance with federal standards and warnings against Meganet's misrepresentations of its capabilities and qualifications.

Examiners (1974) 11 Cal.3d 1, 19; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 346, pp. 397-398.)

Meganet asserts that respondents failed to provide any facts to support their claims that their statements were of genuine public issue or an issue of public interest. We disagree.

Meganet cites and relies upon numerous cases involving commercial transactions between private parties. Unlike ordinary commercial transactions, however, making false representations to the federal government involves public issues and matters of public interest. In their response to Backal's "State of the Union Address" e-mail, respondents cautioned Meganet that "the submission of formal bid proposals in response to federal solicitations are considered by the government as certified and official representations of a company's abilities at the time the information is submitted." Respondents advised Meganet there were "severe financial and criminal penalties" for the willful provision of false information or for concealing a material fact in a proposal or any other communication submitted to or relied upon by the government. Those warnings rested on a sound basis. Federal statute prohibits federal employees from relying on fraudulent documents and provide for civil and criminal penalties for defrauding the government. (See, e.g., 18 U.S.C. § 1002.)

The federal government also has the right to bring a civil action against a false claimant under the False Claims Act. (31 U.S.C. § 3730(a).) In enacting the False Claims Act, Congress intended "to reach all types of fraud, without qualification, that might result in financial loss to the Government." (*United States v. Neifert-White Co.* (1968) 390 U.S. 228, 232, fn. omitted; *Rainwater v. United States* (1958) 356 U.S. 590, 592 ["It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims"]; see generally Davidson, *Applying the False Claims Act to Commercial IT Procurements* (2004) 34 Public Contract L.J. 25.) The act is broadly worded to reach any person who makes or causes to be made "'any claim upon or against' the United States, or who makes a false 'bill, receipt, . . . claim, . . . affidavit, or deposition' for the purpose of 'obtaining or aiding to obtain the payment or approval of' such a false claim." (*United States v. Neifert-White Co.*, *supra*, at p. 232.) Meganet argues if section 425.16 were held to apply here,

"anyone or any company selling a product to a U.S. government agency may be subject to an anti-SLAPP motion." Such is not the case. Section 425.16 has been applied in situations comparable to the situation at hand, which involves statements to a government official calling attention to possible fraud against the government. (*Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 Cal.App.4th 705, 714 [contact with executive branch of government and its investigators concerning potential violation of law came within ambit of § 425.16]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 784 [letter seeking support for investigation by Attorney General into whether money designated for charities was being received by those charities raised question of public interest].)

We conclude that each cause of action stems from respondents' exercise of their petition and free speech rights. The allegations about Callahan's alleged statements to the VA about Meganet and its products are incorporated in each cause of action in the complaint, including the claim for conversion. Beside the pleadings, respondents' declarations and attached documents in support of their motion established Meganet's entire lawsuit arose from respondents' attempts to exercise their rights of petition and free speech.

Respondents' reply to Backal's "State of the Union Address" e-mail of January 2007, for example, contained specific references to Meganet's bids to the VA and the efforts respondents made for Meganet to pursue business arrangements with the VA. Backal's response to respondents, in March 2007, accused both of "telling people false stories about Maganet" and referred to orders received from the government, including the VA.

2. Probability of Prevailing on Claim

The second step in an appeal from a ruling on a section 425.16 motion ordinarily requires that the plaintiff show the complaint is both legally sufficient and supported by evidence that, if credited, would sustain a judgment in plaintiff's favor. (*Navellier v. Sletten, supra,* 29 Cal.4th at pp. 88-89.) To establish the requisite probability of prevailing under the second prong of section 425.16, subdivision (b)(1), the plaintiff must

state and substantiate a legally sufficient claim. (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123.) "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) In ruling on a special motion to strike, the court must consider the pleadings and evidentiary submissions of both the plaintiff and the defendant. (§ 425.16, subd. (b)(2).) The court does not weigh the credibility or comparative probative strength of competing evidence, but it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's effort to establish evidentiary support for the claim. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) Measured by that standard, Meganet has failed to meet its burden.

Meganet contends the trial court "abused its discretion" in granting the section 425.16 motion because Meganet showed a probability it would prevail on its claim. Specifically, Meganet argues the evidence before the trial court showed respondents' statements were "defamation per se." Other than stating the bare conclusion and asserting the point was called to the trial court's attention during the hearing, Meganet has provided no argument or authorities to support this contention. The absence of any pertinent argument or attempt to apply the law to the facts at hand is clearly akin to waiver of the point. We may therefore treat the issue as abandoned and need not address it on the merits. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

On the record before us, Meganet failed to establish the probability of prevailing on its claims.

3. Award of Attorney Fees and Costs

The prevailing defendant in a section 425.16 special motion to strike "shall" be entitled to recover his or her attorney fees and costs. (§ 425.16, subd. (c).) The award of fees and costs to a prevailing defendant is mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) "The fee-shifting provision was apparently intended to discourage such strategic lawsuits against public participation by imposing the litigation costs on the

party seeking to 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" (*Ibid.*; see § 425.16, subd. (a).)

Meganet does not challenge the amount of fees and costs awarded. It contends only that they should not have been awarded because the special motion to strike should not have been granted. As we have discussed, the trial court properly granted the section 425.16 motion. Therefore, the trial court properly awarded respondents their attorney fees and costs.

Respondents argue they are also entitled to recover their fees and costs on appeal. We agree. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 785.)

DISPOSITION

The order is affirmed. Respondents are to recover costs on appeal, and the matter is remanded to the trial court for a determination of reasonable fees and costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

RUBIN, Acting P. J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.